NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EPICENTER RECOGNITION, INC.,	)	No. 02-56589
	)	
	)	D.C. No. CV-99-00195-DOC
Plaintiff-Appellee,	)	
	)	
v.	)	**MEMORANDUM**[*]
	)	
JOSTENS, INC.,	)	
	)	
Defendant-Appellant.	)	
	)	

Appeal from the United States District Court
for the Central District of California
David O. Carter, District Judge, Presiding

Argued and Submitted October 7, 2003
Pasadena, California

Before: REINHARDT, FERNANDEZ, and RAWLINSON, Circuit Judges.

Jostens, Inc. appeals the district court's decision that it violated 15 U.S.C. § 2 by monopolizing trade in high school graduation products, and also violated California Business and Professions Code § 17200. We reverse.

[*] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

(1) Monopoly. In order to prevail on a monopolization claim, the plaintiff, here Epicenter Recognition, Inc., had to show, inter alia, that Jostens possessed monopoly power in the relevant market. See Image Technical Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1202 (9th Cir. 1997). That, in turn, means that Jostens must have had the "'power to control prices or exclude competition.'" Id. (citation omitted). That is, there must be either direct or circumstantial evidence of monopoly power. See Rebel Oil Co., Inc. v. Atlantic Richfield Co., 51 F.3d 1421, 1434 (9th Cir. 1995); Oahu Gas Serv., Inc. v. Pac. Res., Inc., 838 F.2d 360, 363-67 (9th Cir. 1988).

There is no direct evidence on this record. See id.; Forsyth v. Humana, Inc., 114 F.3d 1467, 1475 (9th Cir. 1997). Therefore, we must turn to the consideration of circumstantial evidence. To demonstrate monopoly power by that route, it was necessary for Epicenter to: "(1) define the relevant market, (2) show that the defendant owns a dominant share of that market, and (3) show that there are significant barriers to entry and show that existing competitors lack the capacity to increase their output in the short run." Rebel Oil, 51 F.3d at 1434 (citations omitted).

The relevant market was defined.[1] Moreover, there can be little doubt that

[1] There is no dispute on appeal about the district court's definition of that market as high school graduation products – class rings, announcements, and caps

(continued...)

Jostens, with an overall market share in the 80 percent range, does hold a dominant market position. See Image Technical, 125 F.3d at 1206; see also Rebel Oil, 51 F.3d at 1437-38. Of course, we cannot stop there, and must go on to see whether the barriers to entry are sufficient to give Jostens the ability to maintain that dominant position by use of its Total Service Program documents (TSPs). See United States v. Syufy Enters., 903 F.2d 659, 665-66 (9th Cir. 1990); Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc., 627 F.2d 919, 924 (9th Cir. 1980). It is on that rock that Epicenter's case founders, and it is there that the district court went astray.

In order to circumstantially demonstrate that Jostens has monopoly power, Epicenter had to show that there were barriers to entry and to expansion. See Rebel Oil, 51 F.3d at 1439; see also Metronet Servs. Corp. v. U.S. W. Communications, 329 F.3d 986, 1006 (9th Cir. 2003) (the key is competitor's ability to take business away from the incumbent). There can be a number of sources for entry barriers. See Am. Prof'l Testing Serv., Inc. v. Harcourt Brace Jovanovich Legal and Prof'l Publ'ns, Inc., 108 F.3d 1147, 1154 (9th Cir. 1997). Epicenter suggests that Jostens' good reputation is itself an entry barrier. It is not. See Am. Prof'l Testing, 108 F.3d at 1154. Closer to the mark is the claim that the

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[1](...continued)
and gowns.

relevant TSPs are exclusive dealing contracts, because we have indicated that exclusive dealing contracts can create entry barriers. See Syufy, 903 F.2d at 667; see also Omega Envtl., Inc. v. Gilbarco, Inc., 127 F.3d 1157, 1162 (9th Cir. 1997). But even that is greatly attenuated when the contracts can be terminated at will and upon short notice. See W. Parcel Express v. United Parcel Serv. of Am., Inc., 190 F.3d 974, 976 (9th Cir. 1999).

Here the facts clearly show that the schools are not required to deal exclusively with Jostens, and can, with or without TSPs, switch to different or additional vendors at will. The only barrier is the schools' own inertia, their desire to continue with a single vendor as long as they are getting good service and quality, and some undefined moral committment. But if they should become dissatisfied with Jostens because of a lowering of service, or quality, or because of an increase in prices, they can and will switch – indeed, they have switched to Jostens' competitors, including Epicenter, when they have become discontent or have sought a better arrangement. Still, perhaps the schools' power and attitudes (not Jostens') are sufficient to create a small, though leaky, entry barrier. See F.T.C. v. Warner Communications Inc., 742 F.2d 1156, 1163 (9th Cir. 1984); see also U.S. Philips Corp. v. Windmere Corp., 861 F.2d 695, 703 (Fed. Cir. 1988). But that does not extend to the other branch of Epicenter's conjunctive burden – expansion restrictions.

It is apparent from the record that if Jostens should attempt to increase prices or decrease quality, Jostens' existing competitors could easily and quickly expand production and pick up the slack. See Rebel Oil, 51 F.3d at 1441; Syufy, 903 F.2d at 666-67; see also Digital Equip. Corp. v. Uniq Digital Techs., Inc., 73 F.3d 756, 761-762 (7th Cir. 1996); Ball Mem'l Hosp., Inc. v. Mutual Hosp. Ins., Inc., 784 F.2d 1325, 1335 (7th Cir. 1986).

Jostens may have a dominant market share, but it lacks real puissance – any misstep can lead to a school's desire to switch to others, and many shifted to Jostens' competitors – including the new, inexperienced Epicenter – during the heyday of the TSPs because the barrier is slight and the ability of the competition to expand is great. We are, therefore, constrained to hold that the district court clearly erred when it decided that Jostens had monopoly power. See Los Angeles Land Co. v. Brunswick Corp., 6 F.3d 1422, 1425 (9th Cir. 1993). That being so, we need not, and do not, consider the other elements of the claim that Jostens violated § 2.[2]

(2) Unfair Competition. The district court granted an injunction under California law on the theory that Jostens had engaged in unfair competition when

[2] As a result of this determination, we also need not consider whether the antitrust immunity (state action) doctrine has any application here. See Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc., 810 F.2d 869, 874-75, 878 (9th Cir. 1987) (outlining doctrine).

it used the TSPs. See Cal. Bus. & Prof. Code §§ 17200, 17203. We do not agree.

Because Jostens' actions were not illegal, they were not, ipso factor, unfair. See Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 180, 973 P.2d 527, 539-540, 83 Cal. Rptr. 2d 548, 561 (1999). Of course, in theory, its actions could be unfair even if not illegal. See id. at 180, 973 P.2d at 540, 83 Cal. Rptr. at 561. It is unclear whether the district court found that Jostens' actions violated the unfair competition law on that theory, but, at any rate, the facts do not indicate that those actions posed a significant threat to competition under the circumstances. See id. at 186-87, 973 P.2d at 544, 83 Cal. Rptr. at 565; Scripps Clinic v. Superior Court, 108 Cal. App. 4th 917, 939, 134 Cal. Rptr. 2d 101, 116 (2003). Therefore, the district court erred when it founded an injunction on California's unfair competition law.

REVERSED.[3]

[3] This, of necessity, reverses the grant of damages, an injunction, costs, and attorney's fees pursuant to 15 U.S.C. §§ 15, 26. It also reverses the grant of the injunction under California's unfair competition law. No attorney's fees were asked for or awarded for that alleged violation.